

**IN THE ALABAMA COURT OF THE JUDICIARY**

<b>IN THE MATTER OF:</b>	*	
	*	
<b>TRACIE TODD</b>	*	<b>CASE NO. 61</b>
<b>CIRCUIT COURT JUDGE</b>	*	
<b>BIRMINGHAM DIVISION</b>	*	
<b>CRIMINAL DIVISION</b>	*	
<b>JEFFERSON COUNTY, AL</b>	*	

**JUDICIAL INQUIRY COMMISSION’S  
RESPONSE TO JUDGE TODD’S REPLY TO  
COMMISSION’S RESPONSE IN OPPOSITION**

COMES NOW, the Judicial Inquiry Commission (hereinafter “the Commission”) and hereby files this Response to Judge Tracie A. Todd’s (hereinafter “Judge Todd”) Reply to Commission’s Response in Opposition. The Commission feels the need to address several issues raised by Judge Todd and states as follows:

**I. This Court does not have jurisdiction to consider Judge Todd’s Motion to Modify Final Judgment by Amending Term of Suspension.**

Judge Todd first argues that the Commission is now arguing that this Court lacks jurisdiction when it has filed postjudgment motions in the past. That is true. However, the two filings that Judge Todd cites— motions regarding costs in COJ No. 50 and 58—were filed prior to the Commission’s determination that the more natural reading of Rule 16 of

the Rules of Procedure for the Alabama Court of the Judiciary and § 157 of the Alabama Constitution of 1901 is that the Alabama Supreme Court has the exclusive jurisdiction to make any kind of ruling regarding the propriety of a final decision of the Court of the Judiciary.

That reading makes sense both as a matter of law and as a matter of public policy. It would be counterintuitive that no fewer than six judges are required to impose a sanction<sup>1</sup> but that the Chief Judge acting alone would have the authority to unilaterally decrease that sanction.<sup>2</sup>

Moreover, motions for costs are not equivalent to motions under Rules 59(e) and 60(b) of the Alabama Rules of Civil Procedure. Rather, “taxation of costs or attorney’s fees are matters collateral to [a] judgment” of the Court. Duncan v. Duncan, 336 So. 3d 666, 670 (Ala. Civ. App. 2021). Thus, the Commission maintains that this Court retains jurisdiction to consider such awards even if the Alabama Supreme Court acquires exclusive jurisdiction to review “a finding that the judge committed a violation and the imposition of a sanction.” Jinks v. Alabama Jud. Inquiry Comm’n, No. 1210133, 2022 WL 12183411, at \*10 (Ala. Oct. 21, 2022).

---

<sup>1</sup> See R. P. for the Court of the Judiciary 16.

<sup>2</sup> See R. P. for the Court of the Judiciary 9.

Judge Todd faults the Commission for “cit[ing] no authority for its threadbare argument.” Reply at 2. It is understandable that there is no authority, as the Commission raised this argument for the first time on January 24, 2022. See Response at 3–4, In re Blocton, No. 60 (Ala. Ct. Jud. Jan. 14, 2022). Judge Cole declined to address the issue at that time, denying Judge Blocton’s motion on other grounds. See Order, In re Blocton, No. 60 (Ala. Ct. Jud. Feb. 11, 2022). The Alabama Supreme Court has not yet weighed in. Nevertheless, the Commission maintains that the most straightforward and sensible reading of the law is that the Alabama Supreme Court has the exclusive jurisdiction to make any ruling on the propriety of a final decision of the Court of the Judiciary.

**II. Judge Todd’s motion fails to meet the requirements of Rule 60(b).**

Judge Todd filed a motion to “modify” this Court’s Final Judgment. She did not file a motion for “relief from judgment or order” under Rule 60 of the Rules of Civil Procedure. She did not mention Rule 59(e) or Rule 60(b) or any other rule or any law of any kind in her initial motion. She appears to concede that a motion under Rule 59(e) would be untimely and that she, therefore, must proceed under Rule 60(b). However, Judge Todd’s motion fails to meet the requirements of Rule 60(b).

“Rule 60(b) is not designed to relieve a party from the deliberate choices he or she has made.” Gonzalez v. Gonzalez, 315 So. 3d 1134, 1138 (Ala. Civ. App. 2020) (cleaned up). Likewise, “the broad power granted by Rule 60(b) cannot be used to relieve a party from free, deliberate, and calculated choices.” Ex parte Anderson, 166 So. 3d 86, 101 (Ala. 2014). Judge Todd expressly and deliberately decided to let “the deadline pass last week for the filing of a notice of appeal.” Mot. to Modify at 1. Her decision was a calculated choice “to demonstrate good faith acceptance and confidence in this Court’s October 18, 2022 decision.” Reply at 4.

“Despite the general discretion vested in trial courts to grant or deny relief from a judgment, a Rule 60(b) motion is not a substitute for appeal and is not available to relieve a party from [her] failure to exercise the right of appeal.” Russell Constr. of Alabama, Inc. v. Peat, 310 So. 3d 341, 347 n.5 (Ala. 2020) (cleaned up). Judge Todd is asking for a reduced sanction. As the Alabama Supreme Court recently confirmed, “sanctions imposed by the COJ are reviewable by [that] Court,” and it has the authority to “reject or reduce the sanction imposed in this case.” Jinks, 2022 WL 12183411, at \*12, 9. Judge Todd is asking for the precise relief that she could have asked for in a timely-filed appeal.

Judge Todd appears to argue that she should be granted relief under both Rule 60(b)(1) and Rule 60(b)(6). That is not possible because Rule 60(b)(6), the catchall provision of Rule 60(b), “is mutually exclusive of the specific grounds of clauses (1) through (5), and a party may not obtain relief under clause (6) if it would have been available under clauses (1) through (5).” Washington Mut. Bank, F.A. v. Campbell, 24 So. 3d 435, 442 (Ala. 2009) (quoting R.E. Grills, Inc. v. Davison, 641 So. 2d 225, 229 (Ala. 1994)).<sup>3</sup>

Rule 60(b)(1) does not apply. Rule 60(b)(1) is triggered only when the final judgment leading to the motion was undermined by “mistake, inadvertence, surprise, or excusable neglect.”<sup>4</sup> Judge Todd does not make

---

<sup>3</sup> A narrow exception applies where “an extraordinary circumstance exists that can be considered as a basis for relief under Rule 60(b)(6), despite the fact that it also can serve as a basis for relief under Rule 60(b)(1),” but this requires “active misrepresentation” by the party’s counsel. Ex parte Branson Mach., LLC, 78 So. 3d 950, 958 (Ala. 2011); see also Chambers County Comm’rs v. Walker, 459 So. 2d 861, 865 (Ala. 1984). Judge Todd has posited some possible mistake by counsel, but she certainly has not alleged any active misrepresentation by her attorneys.

<sup>4</sup> See, e.g., Conway v. Hous. Auth. of Birmingham Dist., 676 So. 2d 344, 345 (Ala. Civ. App. 1996) (party filed “a procedurally valid motion seeking relief under Rule 60(b)(1)” when alleging that a complaint was dismissed because the date of an accident had been inadvertently misstated); E.H. Smith & Son Elec. Contractors, Inc. v. Springdale Mall Joint Venture, 592 So. 2d 574, 576 (Ala. 1992) (trial court erred in denying Rule 60(b)(1)

any allegations of that sort. On the contrary, she “fully respects and accepts the Court’s judgment.” Mot. to Modify at 1. She raises no factual mistake or issue whatsoever that might undermine this Court’s Final Judgment. Rather, she vaguely refers to a possible mistake by counsel regarding the timing of filing her motion. To the extent that Judge Todd argues that her attorneys “failed to file a timely” motion or appeal because they were unclear about the law, it is well established “that a mistake of law is not a ground for relief under Rule 60(b)(1).” Ex parte Alfa Mut. Gen. Ins. Co., 681 So. 2d 1047, 1050 (Ala. 1996); see also Wal-Mart Stores, Inc. v. Green, 740 So. 2d 412, 413 (Ala. Civ. App. 1999).<sup>5</sup>

Thus, Judge Todd must proceed under the catchall Rule 60(b)(6)—“any other reason justifying relief.” “Rule 60(b)(6) is an extreme remedy

---

motion where a party failed to respond to a third-party complaint because the complaint was never actually received); Barnett v. Ivey, 559 So. 2d 1082, 1083 (Ala. 1990) (attorney asked that case be restored to the docket because he did not receive the notice of dismissal).

<sup>5</sup> But see Kemp v. United States, 142 S. Ct. 1856, 1860 (2022) (“a judge’s errors of law are indeed ‘mistake[s]’ under Rule 60(b)(1)”). For now, Kemp applies only to errors of law by judges, not lawyers. But were Kemp to be extended to attorneys and if it applied in Alabama, it would still have no effect on the case here. As discussed above, the decision of when to file was a deliberate, calculated choice—not a mistake. And any “mistake” occurred well after this Court’s Final Judgment and had nothing to do with anything appearing in the Final Judgment or its execution.

and relief under Rule 60(b)(6) will be granted only in unique situations where a party can show exceptional circumstances sufficient to entitle [her] to relief.” Gillis v. Frazier, 214 So. 3d 1127, 1132 (Ala. 2014) (cleaned up). “Relief is granted only in the most extraordinary and compelling circumstances.” Ex parte State ex rel. J.Z., 668 So. 2d 566, 571 (Ala. 1995). And relief “is available only in cases of extreme hardship or injustice.” SAI Montgomery BCH, LLC v. Williams, 295 So. 3d 1048, 1052 (Ala. 2019) (cleaned up). Judge Todd has not shown extraordinary, exceptional, or compelling circumstances justifying relief. She reiterates the burden on the Jefferson County courts and her new Continuing Legal Education hours<sup>6</sup> but does not explain how they meet that standard.<sup>7 8</sup>

---

<sup>6</sup> Judge Todd refers to her CLE hours as “new information,” seemingly alluding to the “newly discovered evidence” clause of 60(b)(2). Reply at 5. But that obviously does not apply as the “evidence” must be “in existence at the time of trial”; “[t]here can be no Rule 60(b)(2) relief for evidence which has come into existence after the trial is over.” Wal-Mart Stores, Inc. v. Pitts, 900 So. 2d 1240, 1245 (Ala. Civ. App. 2004) (cleaned up).

<sup>7</sup> Judge Todd faults the Commission’s citation to Holman v. State Dep’t of Indus. Rels., 668 So. 2d 817, 818 (Ala. Civ. App. 1995), perhaps misunderstanding the point. The Commission merely drew a comparison. The key was “good cause.” Just as there is no “good cause” exception to a timely filing of an unemployment compensation appeal, there is nothing to indicate a “good cause” exception to timely filing a Rule 59(e) motion.

<sup>8</sup> The first paragraph of section B of Judge Todd’s Reply is puzzling. She

**III. This Court appropriately sanctioned Judge Todd for violating Canon 1 by refusing to fully comply with this Court's order to return to work, and Judge Todd offers no compelling reason to modify that sanction.**

According to Judge Todd, the "Commission provides no reason why those extra 30 days are so consequential." Reply at 6. Judge Todd misapprehends the burden at this stage. It is Judge Todd's burden to both allege and prove that "there has been a breach of a legal right and where the record plainly shows that the trial court erred" if proceeding under Rule 59(e). Opry S. Land Inv. Grp., Ltd. v. Price, 679 So. 2d 1083, 1085 (Ala. Civ. App. 1996). Or the "exceptional circumstances sufficient to entitle [her] to relief" if proceeding under Rule 60(b)(6). Gillis, 214 So. 3d at 1132. Judge Todd has failed to meet either burden.

Rather, she again merely points to her eight hours of Continuing Legal Education, which included "6.5 hours of Ethics CLE – or [6.5] times the amount that she is required." Reply at 6. Again, while commendable,

---

appears to argue that because the "sanction" and "violation" are separate findings, she does not have to comply with Rule 59(e). She does not explain why this is the case, nor does it make sense. Both the finding of the violation and sanction were part of this Court's Final Judgment. The Alabama Supreme Court has confirmed that both findings comprise part of the Court of the Judiciary's final "decision." Jinks, 2022 WL 12183411, at \*10. The sanction is part of this Court's "judgment," whether Judge Todd proceeds under Rule 59(e) or Rule 60(b).



Judge Todd is already required to complete a minimum of twelve hours of continuing judicial education.<sup>9</sup> Judge Todd has not explained how completing something that is required of every Alabama judge qualifies as extraordinary, exceptional, or compelling circumstances (even if a higher proportion of the hours for Judge Todd may be in ethics than for other judges). Judge Todd should not be given special consideration for completing something mandated for every Alabama judge.

Judge Todd also reiterates that shortening her suspension will “minimize further disruption on the Birmingham Circuit Court Criminal Division.” Reply at 7. Again, her overture rings hollow. She decidedly did not show the same concern when ordered to return to work on December 6, 2021. If Judge Todd’s true concern was her fellow judges, she had the opportunity to demonstrate that in December 2021.

Finally, although Judge Todd claims to respect and accept this Court’s judgment, she also clearly believes that this Court got it wrong.<sup>10</sup>

---

<sup>9</sup> See Rules for Mandatory Continuing Judicial Education for Supreme Court Justices, Appellate Court Judges, Circuit Court Judges, and District Court Judges of Alabama, Rule 1(a). As would be the case for any other judge with extra ethics hours, the spillover 5.5 hours of ethics training can be applied to the remainder of the twelve hours.

<sup>10</sup> See Mot. to Modify at 4 (“Additional delay in her return to the bench

**WHEREFORE**, premises considered, the Commission again respectfully requests that this Honorable Court deny the Motion to Modify Final Judgment by Amending Term of Suspension.

Respectfully submitted this the 29th day November, 2022.

/s/ John A. Selden

John A. Selden

/s/ Elizabeth C. Bern

Elizabeth C. Bern

/s/ Jacob D. Jackson

Jacob D. Jackson

Attorneys for the Commission

Alabama Judicial Inquiry Commission

P.O. Box 303400

Montgomery, AL 36130-3400

[john.selden@jic.alabama.gov](mailto:john.selden@jic.alabama.gov)

[elizabeth.bern@jic.alabama.gov](mailto:elizabeth.bern@jic.alabama.gov)

[jacob.jackson@jic.alabama.gov](mailto:jacob.jackson@jic.alabama.gov)

(334) 242-4089

---

imposes undue costs on the administration of justice that exceed the punitive value of a last month of suspension"); Reply at 7 ("This Court knows not to have a sanction exceed what is sufficient to serve its point and not to harm or inconvenience third parties where unnecessary – an amendment to a 90 days suspension is the correct sanction in this case").

## CERTIFICATE OF SERVICE

I hereby certify that I have, on this 29th day of November, 2022, electronically filed the foregoing with the Court of the Judiciary, and that I have further served a copy upon the following via email as follows:

Richard A. Rice, Esq.  
The Rice Firm, LLC  
115 Richard Arrington Jr. Blvd. N.  
Birmingham, AL 35203  
[rrice@rice-lawfirm.com](mailto:rrice@rice-lawfirm.com)  
(205) 618-8733, ext. 101

Edward J. Ungvarsky, Esq.  
Ungvarsky Law, PLLC  
114 North Alfred Street  
Alexandria, VA 22314  
[ed@ungvarskylaw.com](mailto:ed@ungvarskylaw.com)  
(571) 207-9710

/s/ John A. Selden  
John A. Selden  
Attorney for the Commission